United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-1004

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1004

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING

PAUL J. CURRAN,
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Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

The United States respectfully petitions for rehearing of that portion of the decision of this Court, filed July 28, 1975, that reverses the conviction of Scansaroli and remands for a new trial as to him.

Reasons for this Petition

Natelli and Scansaroli were tried and convicted on a single count of wilfully making and causing to be made false and misleading material statements in a proxy statement; the count specified two such false statements: the "footnote" and the "nine months earnings statement." This Court found sufficient evidence on each specification to sustain Natelli's conviction but held as to Scansaroli that there was insufficient evidence to go to the jury on the

second specification. On that basis, this Court concluded that as to Scansaroli: "there seems to be no alternative to remand for a new trial" (slip op. at 5191).

It is this last conclusion—that a finding of insufficiency on one specification of a count alleging several specifications of falsity requires automatic reversal—that the Government respectfully challenges here. That aspect of the holding is contrary to the rule hitherto consistently applied in this Circuit: that in the absence of a specific defense motion, not made here, to withdraw a specification from a count before its submission to the jury, a conviction on a count having several specifications will be upheld if the evidence was sufficient on any one of them. Moreover, the departure in this case from this settled rule, if followed, would have pronounced consequences adverse to the District Court and the parties in criminal cases, for the Government will be required—given the policy against special verdicts—to file false statement and perjury indictments in which every separate false statement is the subject of a separate count, rather than take the risk that by placing them all in one count, the defendant, without a word of objection at trial, can win reversal on appeal by finding some insufficiency in a single one of the specifications.*

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* The Court appears to have been of the view that Judge Tyler's failure to give a specific instruction to the jury to be unanimous on the specification of falsity found was in some way related to the problem of insufficiency of the evidence as to Scansaroli on the second specification, slip op. at 5191. We respectfully submit that there is no relationship between the two. Whatever the need for a specific instruction on unanimity, but see *United States* v. *Armone*, 363 F.2d 385, 398 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966), such an instruction would have had no effect on what the Court found to be the problem presented by its finding of insufficient evidence as to the second specification: that "the jury could have rejected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved," slip op. at 5191. For the jury could have been unanimous, but on the insufficient specifica-

[Footnote continued on following page]

In light of this Court's perhaps unwitting departure from the settled rule of this Circuit and the substantial detrimental consequences to the administration of justice certain to result from such a departure, and given the fact that the issue has not yet been briefed or argued as part of this appeal,* the Government respectfully urges that a rehearing by this Court on this limited issue is warranted.

ARGUMENT**

A Conviction On A Count Specifying Several Means By Which A Crime Was Committed Will Not Be Reversed For The Insufficiency Of Proof Of A Specified Means If The Defendant Did Not Move At Trial For The Removal From The Jury's Consideration Of Those Particular Means.

Even prior to the adoption of Rule 7(c) of the Federal Rules of Criminal Procedure,*** it was settled law that a

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tion. The Government respectfully submits that the only proper solution to that problem is a request, made before submission of such a count to the jury, that a specification be stricken as insufficiently supported by the evidence.

* Neither of Scansaroli's briefs, though dealing largely with the issue of sufficiency, so much as raises the issue. Two stray sentences at pages 37 and 97-98 of the brief of the other defendant, Natelli, reiterated at page 53 of his reply brief, contend (without dealing with the question of objection and waiver) that insufficiency of either one of the two specifications mandates reversal, citing two cases (neither relied on by this Court). The Government's brief does not deal with the point, nor was it raised by this Court at oral argument.

** The facts of this case are set forth in the Court's opinion of July 28, 1975.

*** Rule 7(c)(1) provides in pertinent part that "It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means." An earlier draft used the term "ways" instead of "means." 1 L. Orfield, Criminal Procedure Under The Federal Rules § 7:3 (1966).

single count of an indictment could specify several ways or means by which the crime had been committed and that it was sufficient for conviction that the jury find only one such specification beyond a reasonable doubt.* In this Circuit it became equally settled that a defendant could not win reversal on appeal on the ground of insufficiency of proof of one of several specifications in a single count if he had not moved at trial, as Scansaroli did not here, *infra* at 9-11, to eliminate the insufficient specification from the jury's consideration before the otherwise sufficient count was submitted to them.

Thus, in *United States* v. *Mascuch*, 111 F.2d 602, 603 (2d Cir.), *cert. denied*, 311 U.S. 650 (1940), where the appellant was convicted of giving perjured testimony before the Securities and Exchange Commission, this Court, per Swan, C.J., stated:

> "Each count contained several assignments of perjury and the jury was instructed that to sustain a verdict of guilt on either count they need only be satisfied as to one of the specifications of perjury alleged in that count; that they should consider all the assignments but should return a separate verdict only as to each count. Upon this appeal the defendant argues that in each count one or more of the assignments of perjury were not supported by the evidence, and if any assignment in either count was improperly submitted to the jury the verdict on that count cannot stand since it is impossible to determine on which assignment the defendant's guilt was predicated.

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* *E.g.*, *United States* v. *Otto*, 54 F.2d 277, 279-280 (2d Cir. 1931); *United States* v. *Astolas*, 487 F.2d 275, 280 (2d Cir. 1973), *cert. denied*, 416 U.S. 955 (1974), and cases there cited. See also 2 Wharton's Criminal Law § 1567, at 1826 (12th ed. J. Ruppenthal 1932): "All the several particulars, in which the prisoner swore falsely, may be embraced in one count, and proof of the falsity of any one will sustain the count."

> This argument was not presented to the trial court and, strictly, is not available to the appellant here. Trial errors will not ordinarily be reviewed on appeal unless called to the trial judge's attention in order to afford an opportunity for timely correction. The appellant failed to ask the trial court to withdraw from the jury any specific assignment of perjury. Where such restricted submission is desired, it must be requested and refused to be available as an error to be urged on appeal. See United States v. Dillard, 2 Cir., 101 F.2d 829, 833, certiorari denied 306 U.S. 635, 59 S.Ct. 484, 83 L.Ed. 1036; Claassen v. United States, 142 U.S. 140, 147, 12 S.Ct. 169, 35 L.Ed. 966. At the close of the government's case, and again at the close of all the evidence, the defendant moved for a directed verdict on each count. In arguing the motion it was urged that none of the assignments was proved, but we do not regard the motion as equivalent to a motion to withdraw from the jury a specific assignment of perjury, for the motion would properly be overruled if a single assignment in each count was supported by the evidence. See United States v. Otto, 2 Cir., 54 F.2d 277, 279. Therefore the only contention which the appellant is entitled as of right to urge upon appeal is whether there was sufficient evidence to support one assignment of perjury in each count, and not—as counsel argues—whether any assignment in either count should have been withdrawn from the jury.
>
> That at least one assignment in each count was sufficiently proved is clear beyond peradventure of doubt."

Similarly, in *United States* v. *Goldstein*, 168 F.2d 666, 671 (2d Cir. 1948), Judge Chase, writing for himself and Judges Augustus and Learned Hand, stated:

> "Even if, as a matter of law, the evidence did not support the verdict as to certificates 5, 6, and 7, it did as to 8. That is enough. The single count

> charged perjury as to [these] four certificates, that is, made four assignments of perjury in one count. The appellant did not request the withdrawal of any specific assignment of perjury. Rather, he moved for a dismissal of the entire indictment both at the close of the government's evidence and again at the close of all the evidence. That is not the equivalent of a request for a restricted submission. In the absence of such request and its denial, it is enough that one assignment in the count was adequately proved."

The principles of *Mascuch* and *Goldstein* have been reaffirmed on numerous occasions.* As recently as *United States* v. *Pollak*, 474 F.2d 828, 832 (2d Cir. 1973), this Court, relying on *Goldstein*, reached the question of sufficiency of all the specifications of perjury in that case only because the proper request for a restricted submission to the jury had been made below.

The requirement of a specific motion below is not vitiated in any way by cases in the line of *Yates* v. *United States*, 354 U.S. 298 (1957) and *Stromberg* v. *California*,

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* *E.g.*, *United States* v. *Otto*, *supra*, 54 F.2d at 279-280; *United States* v. *Dilliard*, 101 F.2d 829, 833 (2d Cir. 1938) (L. Hand, *C.J.*), *cert. denied*, 306 U.S. 635 (1939); *United States* v. *Smith*, 112 F.2d 83, 86 (2d Cir. 1940); *United States* v. *Koch*, 113 F.2d 982, 984 (2d Cir. 1940); *United States* v. *Kushner*, 135 F.2d 668, 672 (2d Cir.), *cert. denied*, 320 U.S. 212 (1943); *Doan* v. *United States*, 202 F.2d 674, 679 (9th Cir. 1953); *United States* v. *Roth*, 237 F.2d 796, 800 (2d Cir. 1956) (Clark, *C.J.*), *aff'd*, 354 U.S. 476 (1957). As Chief Judge Clark said in *Roth*, *supra*, 237 F.2d at 800 (citing *Mascuch*, *Goldstein*, and numerous other cases): "Here we have more than a waiver by failure to object. We have in fact an instance of submission of issues to the jury on more than a single ground which might have been separated had the parties so desired. Since no request for separate verdicts or for withdrawal of this issue from the jury was made, the conviction must stand as supported by the clear evidence of obscenity."

283 U.S. 359 (1931),* referred to in this Court's present opinion. For one thing, none of these cases adverts to the question of motion and waiver, and the inference arises that appropriate limiting motions were made at the trial level. In *Stromberg*, for example, where a count, tracking a state sedition statute, alleged three specifications the first of which was unconstitutional, the Supreme Court, 283 U.S. at 364-65, reasoned that, by excepting to each of the specifications as well as the statute and count as a whole, the defendant had preserved for appeal her contention that she might have been convicted on an unconstitutional specification.** Similarly, with respect to *Yates*, the reported opinion of the District Court, *United States* v. *Schneiderman*, 106 F. Supp. 892 (S.D. Cal. 1952), discloses that a specific application was made, among others, to withhold from the jury overt acts claimed to be barred by the statute of limitations, and the Supreme Court's later reversal was premised on the submission to the jury of an object of the conspiracy which the Court found to be time-barred, and the overt acts supporting it.

More fundamentally, not a single case in the *Yates-Stromberg* line deals with the question of evidentiary sufficiency. In fact, as pointed out in *Vitello* v. *United States*, 425 F.2d 416, 419 (9th Cir.), *cert. denied*, 400 U.S. 822 (1970), each of the cases—*Yates*, *Stromberg*, *Cramer* v. *United States*, 325 U.S. 1, 36 n.45 (1945); *Leary* v. *United States*, 395 U.S. 6 (1969), and *Street* v. *New York*, 394 U.S. 576 (1969)—except arguably *Yates*,*** "involved a convic-

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* *Mascuch* and *Goldstein* both were decided after *Stromberg*, and *Roth* was affirmed by the Supreme Court just one week after it decided *Yates*.

** The Supreme Court also took note of the fact that the prosecutor had particularly urged conviction on the basis of the unconstitutional specification, 283 U.S. at 368.

*** Although in *Yates* the question was whether one of the objects of the conspiracy and the overt acts in furtherance of that object were barred by the statute of limitations, the question arose from a need to construe that object with sufficient narrowness to save the constitutionality of the statute on which it was based.

tion which might have been based, in part, upon a constitutionally invalid statute." Clearly, these kinds of situations differ drastically from the ordinary problem of a specification on which the evidence is merely insufficient, for at least two reasons. One is that a substantial question of the constitutionality of a statute may not be so readily waived by a failure to object as may an everyday question of the sufficiency of evidence, particularly where there is a danger of chilling constitutionally protected activity. This is the gloss that the Supreme Court itself appears to have put on this entire line of cases, stating, in *Street* v. *New York*, *supra*, 394 U.S. at 586, that:

> "The principle established in *Stromberg* has been consistently followed. In *Williams* v. *North Carolina*, 317 U.S. 287 (1942), this Court again held itself compelled to reverse a conviction based upon a general jury verdict when the record failed to prove that the conviction was not founded upon a theory which could not *constitutionally* support a verdict. The Court stated:
>
> 'To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid *constitutional* ground . . . would be to countenance a procedure which would cause a serious impairment of *constitutional rights.*' *Id.*, at 292.
>
> The rule was again applied in *Cramer* v. *United States*, 325 U.S. 1, 36, n.45 (1945); *Terminiello* v. *Chicago*, 337 U.S. 1, 5-6 (1949); and *Yates* v. *United States*, 354 U.S. 298, 311 (1957)." (emphasis supplied)

Second, where two specifications of crime go to a jury on a single count and one of the specifications is barred, not by insufficiency of the evidence, but by unconstitutionality or running of the statute of limitations or some other purely legal reason, there is no way of telling which of the two specifications the jury determined was the basis of guilt.

But where the only difference between the specifications is that the evidence on one was so lacking as to make it inappropriate even to submit it to the jury, common sense suggests a high probability that the jury concluded guilt on the specification for which there was sufficient proof; hence reversal should surely not follow where the defendant himself has not even moved to remove the insufficient specification from the jury's consideration.

Finally, any question that the *Yates* line of cases is inapplicable to the particular kind of problem presented by evidentiary insufficiency and failure to move to strike is laid to rest by the fact that, whereas the narrow holding in *Yates* was that there must be reversal because there was no way of determining whether the jury had based its finding of an overt act on one not in furtherance of an object barred by the statute of limitations, a series of cases following *Yates* have held that "the erroneous submission to the jury of [an] unproven overt act [is] harmless" where other overt acts are clearly established. *United States* v. *Fassoulis*, 445 F.2d 13, 19 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971), citing *United States* v. *Bletterman*, 279 F.2d 320 (2d Cir. 1960). See also *United States* v. *Smith*, *supra*, 112 F.2d at 86, holding that the submission to the jury of both proven and unproven objects of a conspiracy with an instruction that the jury need find only a single object to convict is harmless in the absence of a specific motion at trial to strike the unproven object.

In short, the rule of *Mascuch* and *Goldstein* remains good law: there can be no claim on appeal that the jury may have convicted a defendant on the insufficient specification of an otherwise valid multi-specification count where the defendant did not move below to strike the deficient specification. And in the present case Scansaroli's highly competent, experienced and sophisticated counsel made no such motion.

Indeed, the record strongly suggests that Scansaroli's counsel consciously declined to make such a motion. At the end of the Government's case, counsel for the other defendant, Natelli, first moved (Tr. 1318 ff.) for an acquittal on the grounds of insufficiency of the evidence generally. When this was denied, he then moved to strike the allegations relating to the second specification of fraud (paragraph 4 of the count)—the one found insufficient by this Court as to Scansaroli—on the grounds of insufficiency as to his own client, Natelli (Tr. 1321-22). This motion, too, was denied—rightly again, for as this Court later found, it was sufficient as to Natelli.

When it came time for Scansaroli's counsel, he, too, moved for an acquittal on the grounds of insufficiency of the evidence generally, pointing out at length how his client stood in a different posture from Natelli (Tr. 1335 ff.). Judge Tyler, however, ruled, as this Court later agreed, that there was enough to send the count to the jury as to Scansaroli and denied the motion (Tr. 1337 ff.). This would have seemed the natural moment for Scansaroli to have moved to strike the second specification as Natelli had just done—but (rather pointedly in this context) he chose not to, and instead moved on to other motions. Nor did Scansaroli's counsel join in Natelli's motions as he had done at certain other stages of the proceedings—assuming that such a wholesale adoption-by-reference could have afforded him the benefit of a particularized sufficiency motion.

Finally, at the end of the entire case, both Natelli and Scansaroli moved again for an acquittal for insufficiency generally but neither moved to strike the second specification alone (Tr. 2129 ff.).* The result was that Judge Tyler

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* Even assuming that Natelli's objection to the second specification could somehow be imputed to Scansaroli, it is of no relevance here since it came only at the end of the Government's case. Thereafter, by taking the stand and putting on a defense, both defendants waived their sufficiency motions except as renewed at the

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was never called upon to, and never did, consider or make findings on the sufficiency of the second specification as to Scansaroli, and the issue is put to this Court without its having the benefit it would have had, under the *Mascuch-Goldstein* rule, of findings by the trial court.*

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close of all the evidence; for the question then became whether, in light of all the evidence (including inferences to be drawn against the defendants from their presentation), there was now any insufficiency. *United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). But, as noted, neither defendant, at the close of all the evidence, moved to strike the second specification.

* Such findings would, we respectfully submit, have provided a substantial basis for a determination on appeal that the evidence was sufficient to put Scansaroli's guilt to the jury on the second specification of the count. Although this Court concluded the contrary and that conclusion need not be reconsidered in determining the merits of the Government's contentions on rehearing, we do respectfully suggest that this Court's finding was erroneous. First, this Court treats the second specification as if it related only to the booking of the Eastern contract, slip op. at 5184, but in fact the specification was far broader, as the Court recognized earlier in its opinion, slip op. at 5169. Similarly, the Government's direct proof of Scansaroli's guilt on the second specification went beyond booking the Eastern commitment; it included his refusal to write off $177,000 in bad contracts he had known for three months were bad, and which, under Peat Marwick's accounting method, would have been offset against 1969 earnings if written off. (See GX 65-15). This Court chose to ignore this evidence of Scansaroli's refusal to write off these $177,000 in bad contracts at Oberlander's suggestion, finding it "too equivocal" despite settled rules of appellate review that ". . . the evidence on this count must be viewed in light of the totality of the Government's case, since one fact may gain color from others," *United States* v. *Tramunti*, *supra*, 500 F.2d at 1338, and that "[a] seemingly innocent act, when viewed in the context of surrounding circumstances, may justify an inference of complicity." *United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). In addition to Scansaroli's involvement in the booking of the Eastern contract, slip op. at 5191, and in suppressing the

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Scansaroli's counsel may have had several strategic reasons for not moving to strike the second specification, but at least one of them was rather obvious: as everyone including Judge Tyler recognized (see, *e.g.*, Tr. 2134-35), conviction was a more "close question" as to Scansaroli than as to Natelli, and Scansaroli's chance of acquittal correspondingly greater. By keeping the second specification, on which the Government's proof was less compelling than on the first, Scansaroli was able to score many more points on summation by hammering away (as he did repeatedly) at the Government's proof on this specification, intending that the Government's stronger proof on the first specification would be undercut. Any doubt that this was Scansaroli's strategy is eliminated, first, by the fact that he devoted much more of his summation to denigrating the Government's proof on the second specification than to refuting its proof of the first specification (of the latter he said: "Now, with respect to the adjustments and the footnote, I

Oberlander schedule, the jury had before it Scansaroli's indisputable guilt on the first specification, the fact that both specifications were, as the Government argued throughout, simply part of a more general plan by which the defendants kept the proxy statement as a whole from revealing to investors the truth about National Student Marketing Corporation, and the fact that, as the Government also argued throughout, the defendants acted from a joint motive to falsify that was further reflected in their similar false statements on the witness stand. Perhaps crucially, the jury heard Scansaroli's false and evasive testimony, from which it could properly draw inferences of guilt, *United States* v. *Tramunti*, *supra*, 500 F.2d at 1338, *United States* v. *Pui Kan Lam*, *supra*, 483 F.2d at 1208, *United States* v. *Hedges*, 449 F.2d 1289, 1290 (9th Cir. 1971), testimony which Judge Tyler said was one of ". . . two things [which], without more, in this case I am sure enabled the jury to reach its verdict." (Sentencing Tr. 13, App. A-285).

The net of this is that, had the issue been properly raised by Scansaroli below, the trial court could have had an opportunity to make a finding regarding Scansaroli's culpability on the second specification, a finding which, if not one of aiding and abetting, would have at the very least been one of culpability arising from the joint criminal venture which Judge Tyler elsewhere found was made out by the evidence (Tr. 1319, 1338-1340).

believe that Mr. Martin covered it admirably and I am not going to tread on your time too much with respect to that . . . ." Tr. 2236); and, second, by the fact that, after the jury announced themselves deadlocked, the Government suggested asking the jury whether they could reach a partial verdict "as to either defendant or as to either specification of fraud as to either defendant," to which Scansaroli's counsel, even while favoring a modified Allen charge, immediately objected though Natelli's did not. (Tr. 2422).

This strategy of Scansaroli's not to move to strike the weaker, second specification in order to have more to shoot at and to increase his overall chances of acquittal was perfectly reasonable and proper. But having so chosen at trial, he cannot now, on appeal, disclaim the consequences. His failure to object makes the case indistinguishable from *Mascuch* and *Goldstein* and should be governed accordingly.

As this Court stated in *Roth*, *supra*, the *Mascuch-Goldstein* rule is more than a technical rule of waiver. It serves important policy functions. Like the similar rule of *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*; per *Hays, C.J.*), *cert. denied*, 383 U.S. 907 (1966), which cites *Mascuch*:

> "The reason for requiring that specific objection be made is, of course, to give the judge an opportunity to correct the error and thus to avoid the necessity of further proceedings, possibly including a new trial. In the present case, for example, a proper objection might have resulted in the striking out of the evidence objected to and an admonition to the jury to disregard it. It seems entirely possible that the government could have secured a conviction without the challenged evidence." (352 F.2d at 280)

These views are entirely applicable in a complex and significant case of this sort, in which there was, as this Court has found, sufficient evidence to sustain Scansaroli's con-

viction on the first specification of the count, and in which a retrial will be burdensome both to the parties and to the District Court.

Also, as noted, in this particular area of sufficiency, the *Mascuch-Goldstein* rule provides a mechanism whereby an appellate court will not have to pass on a question that inevitably involves both assessing the importance to the case of the credibility of the witnesses (a very large factor in the present case, where both defendants took the stand) and also weighing all the evidence, without having the advantage of a ruling, and usually findings, on the precise issue by the trial judge who observed and had charge of the entire proceedings. In addition, the *Mascuch-Goldstein* principle has particular virtues that can best be appreciated by what may result if this Court's opinion is this case in effect overrules that principle. Up to now, Rule 7(c) of the Federal Rules of Criminal Procedure and plain common sense have encouraged prosecutors to draft indictments that charge in a single or few counts all the specifications of falsity contained in a single statement, whether, for example, a perjury, a false proxy statement, a false passport application or a fraudulent tax return. This is surely a practice to be encouraged, where the alternative is the drafting of unwieldly indictments, prejudicial from their very size, spinning dozens of counts of falsity out of a single statement that was as here part of a single scheme or fraud, a practice doubtless subject to defense claims of multiplicity. But if the *Mascuch-Goldstein* rule is abandoned by this Court, the sensible drafting of single or few count indictments will become a hazardous process indeed, for should the Government fail to make out a sufficient case as to even a single specification in such counts, the present opinion of this Court in this case would seem to require automatic reversal.

Nor are other alternatives to the *Mascuch-Goldstein* rule available to deal with the problem. While the opinion in this case seems to suggest that Judge Tyler might have

more explicitly instructed the jury that they had to be unanimous as to which specification, if any, they found false, such an instruction would not have solved the problem here. See, *supra*, at 2 n.1. Similarly, the device of a special verdict in such situations has been expressly disapproved in this Circuit and elsewhere. In *United States* v. *Adcock*, 447 F.2d 1337, 1339 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971), this Court held: "Special verdicts as to a single count are improper and in and of themselves erroneous."*

In any event, the Government respectfully submits that the *Mascuch-Goldstein* rule represents the fairest and most efficient approach to balancing the various competing interests involved in this narrow but important question of law, and indeed, it is the only approach under which the drafting of multi-specification counts is likely to continue. Under the *Mascuch-Goldstein* rule, the Government will not be overly-discouraged from drafting multi-specification counts in appropriate circumstances. For if it errs by including some specification for which it has insufficient evidence, defense counsel will have a strong motive to bring the error to the Court's attention by way of a motion-to-strike that will, in the ordinary case, solve the problem for both sides. The only remaining risk will be if the trial court itself errs in its determination of the sufficiency of the specification, but that, of course, is a risk no rule can eliminate.

In short, the *Mascuch-Goldstein* rule leaves to the trial court the correction of errors made by the parties, and

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* The suggestion in the brief of Natelli, (pp. 37 and 97-98), that *Adcock* mandates reversal in these situations, or any notice that it overrules the motion-to-strike requirement of *Mascuch-Goldstein*, is unsupported by anything in *Adcock*, in which the Government conceded (Brief at 13) that a specific request to strike had been made, and is also undercut by this Court's more recent reaffirmation of the *Goldstein* principle in *Pollak*, *supra*.

leaves to the Court of Appeals the correction of the errors made by the trial court; and that clear and appropriate partition of responsibility makes it, the Government submits, a rule this Court should staunchly adhere to.

CONCLUSION

The petition should be granted, and the judgment of conviction of Scansaroli should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States Of America.

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Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Stephen Markstein, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 13th day of August, 1975 he served 2 copies of the within Government's Petition for Rehearing by placing the same in a properly postpaid franked envelope addressed:
(1) Charles A. Stillman, Esq., Morrison, Paul, Stillman & Beiley, 110 East 59th St., New York, NY, 10022, (2) John S. Martin, Jr., Esq. Martin, Obermaier, & Morvillo, 1290 Avenue of the Americas, New York, NY 10019, (3) Victor M. Earle, III, Esq., Peat, Marwick, Mitchell & Co., 345 Park Avenue, New York, NY 10022, (4) Howard J. Krongard, Esq., Cahill Gordon & Reindel, 80 Pine St., New York, NY 10005, (5) John R. Hupper, Esq., Cravath, Swaine & Moore, One Chase Manhattan Plaza, New York, NY 10005.

And deponent further says that he sealed the said envelope and placed the same in the mail box drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Stephen Markstein

Sworn to before me this
13 day of August, 1975

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977